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Breaking the Silence: Holding Texas Lawyers Accountable for Sexual Harassment

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COMMENT

*Savannah Files**

Breaking the Silence:
Holding Texas Lawyers Accountable for Sexual Harassment

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* Candidate for Juris Doctorate, St. Mary’s University School of Law 2019. The author wishes to express her gratitude to her parents, Greg and Tina, for their never-ending encouragement and unconditional love through all of her endeavors without whom none of this would be possible; to Professor David A. Grenardo for his invaluable assistance along the way, and—more importantly—for always having faith in her; to Professor Chad J. Pomeroy for his honesty, which helped guide her along the way; to Professor Bonita K. Roberts for helping her keep things together with a smile on her face; and finally, to Andrew Singhaus for his endless positivity without which this would have never been completed.

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I. BACKGROUND

Following the 2017 exposure of Harvey Weinstein's terrorizing reign of sexual harassment and assault that spanned nearly three decades,¹ a movement spread rapidly across several social media platforms calling for increased awareness about the prevalence of sexual harassment and assault.² The hashtag for the movement, #MeToo, demonstrated the pervasiveness of sexual harassment and assault among people all over the world and the campaign successfully facilitated a much-needed discussion in today's society. This is not the first occasion where outrageous conduct has been brought to the public's attention prompting a demand for change concerning sexual harassment.³ Unfortunately, dramatic change failed to

1. E.g., Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/JB94-K3LC>] (detailing Weinstein's alleged actions over the course of nearly thirty years). As of December 2017, the list of Weinstein's accusers totaled eighty-four people. Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 84 Accusers*, USA TODAY (Dec. 13, 2017, 2:56 PM), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/> [<https://perma.cc/LAY6-628G>]. In the wake of the Harvey Weinstein exposure, victims of sexual harassment have come forward in waves reporting their experiences of sexual harassment. See Sarah Almkhatar, Larry Buchanan & Michael Gold, *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall From Power*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html> [<https://perma.cc/WRU9-CPDE>] (listing those accused, including Louis C.K., Andy Dick, Kevin Spacey, and Lockhart Steele of activity such as indecent exposure, groping, sexual assault, and unwanted sexual advances). This phenomenon, however, is not limited to Hollywood—individuals from other walks of life faced similar accusations as well. See Associated Press, *Minnesota State Senator Accused of Sexual Harassment*, N.Y. POST (Nov. 9, 2017, 5:27 PM), <http://nypost.com/2017/11/09/minnesota-state-senator-accused-of-sexual-harassment/> [<https://perma.cc/4AQ6-9G5Q>] (“[Senator] Schoen, 42, is accused of having made unwanted advances toward women and groping a woman from behind.”); Danika Fears, *Hotelier André Balazs Accused of Groping Multiple Women*, PAGE SIX (Nov. 9, 2017, 4:33 PM), https://pagesix.com/2017/11/09/hotelier-andre-balazs-accused-of-groping-multiple-women/?_ga=2.258630668.786117494.1510591882-919366319.1510591882 [<https://perma.cc/B2MB-M9RZ>] (detailing the inappropriate actions of celebrity hotelier André Balazs to include groping and sexual assault of several women).

2. Anna Codrea-Rado, *#MeToo Floods Social Media with Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html> [<https://perma.cc/X9C5-8H57>]. “Two simple words became a rallying cry on Twitter to stand against sexual harassment and assault. ‘Me too.’” Lisa Respers France, *#MeToo: Social Media Flooded with Personal Stories of Assault*, CNN (Oct. 16, 2017, 7:12 PM), <http://www.cnn.com/2017/10/15/entertainment/me-too-twitter-alyssa-milano/index.html> [<https://perma.cc/FL66-J6XR>].

3. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1693 (1998) (“Tailhook’s lurid details captured the country’s attention: ‘Tailhook . . . was the scandal that opened the Pandora’s box on a problem that has festered for decades.’” (quoting Letta Tayler, *Operation: Parity; Assaults Renew Debate on Role of Women*, NEWSDAY, July 27, 1992, at 6)); see also Johnny Darnell Griggs,

follow such demand and the issue of sexual harassment typically involves victims enduring it in silence.⁴ The effects of sexual harassment remain widespread and are felt in a wide variety of professions.⁵ The legal

Sexual Harassment in Law Firms: The Cobbler's Children Revisited, NEW JERSEY LAWYER, Aug. 2001, at 35, 35–36 (“Over the past decade [1990’s], the issue of sexual harassment has permeated our national consciousness and dominated our national dialogue.”).

4. See Sascha Cohen, *A Brief History of Sexual Harassment in America Before Anita Hill*, TIME (Apr. 11, 2016), <http://time.com/4286575/sexual-harassment-before-anita-hill/> [<https://perma.cc/28ZR-X13R>] (“For most of American history, women silently endured mistreatment in the workplace, with little protection or recourse.”). Some women may be discouraged from reporting their experience for many different reasons, including the difficulty in proving it or the threat of professional repercussions. See Jay Marhoefer, Comment, *The Quality of Mercy is Strained: How the Procedures of Sexual Harassment Litigation Against Law Firms Frustrate Both the Substantive Law of Title VII and the Integration of an Ethic of Care into the Legal Profession*, 78 CHL-KENT L. REV. 817, 819–20 (2003) (explaining how lawyers may be apprehensive about bringing a sexual harassment suit against their employer because they face the possibility of losing their job); see also Wendi S. Lazar, *Sexual Harassment in the Legal Profession: It’s Time to Make It Stop*, N.Y. L.J. (Mar. 4, 2016, 3:00 AM), <http://www.newyorklawjournal.com/id=1202751285096> [<https://perma.cc/742Y-DBLK>] (“The power structure in firm partnerships often perpetuates sexual harassment by shielding harassers and silencing victims. Victims often don’t report because their supervisors may be the harassers or friends of the harasser, and often Human Resource departments, if they exist, have no autonomy.”); Penelope Trunk, *Don’t Report Sexual Harassment (in Most Cases)*, PENELOPE TRUNK (Nov. 2, 2006), <http://blog.penelopetrunk.com/2006/11/02/dont-report-sexual-harassment-in-most-cases/> [<https://perma.cc/47KK-ZHGC>] (advising women to create a plan to deal with their harasser rather than reporting the experience to human resources).

5. See ELEPHANT IN THE VALLEY, <https://www.elephantinthevalley.com/> [<https://perma.cc/5A9Y-3AUU>] (surveying women in the tech industry and reporting sixty percent experienced unwelcomed sexual advances in the workplace); *The Glass Floor: Sexual Harassment in the Restaurant Industry*, THE RESTAURANT OPPORTUNITIES CENTERS UNITED FORWARD TOGETHER 2 (Oct. 7, 2014), http://rocunited.org/wp-content/uploads/2014/10/REPORT_TheGlassFloor_Sexual-Harassment-in-the-Restaurant-Industry.pdf [<https://perma.cc/NMY7-X2XX>] (finding sexual harassment in the service industry to be widespread and reporting sixty-six percent of reported instances of conduct being committed by restaurant management); Marina Koren, *When Scientists are Sexually Harassed in the Field*, THE ATLANTIC (Oct. 11, 2017), <https://www.theatlantic.com/science/archive/2017/10/sexual-harassment-fieldwork-science/542559/> [<https://perma.cc/6MFS-AFKA>] (indicating sixty-four percent of respondents to a survey stated they experienced sexual harassment in their professional capacity as scientists); Chris Megerian et al., *In Her Own Words: Women of California Politics Tell Their Stories of Sexual Harassment and Unwanted Touching*, L.A. TIMES (Oct. 29, 2017, 3:00 AM), <http://www.latimes.com/politics/la-pol-ca-sexual-harassment-sacramento-2017-htmlstory.html> [<https://perma.cc/8Z4Y-5FHD>] (detailing the experiences of twenty women in California who experienced sexual harassment in their professional political capacity); Alexandra Sifferlin, *30% of Female Doctors Have Been Sexually Harassed*, TIME (May 17, 2016), <http://time.com/4337372/30-of-female-doctors-have-been-sexually-harassed/> [<https://perma.cc/4FWQ-KYXN>] (reporting thirty percent of female doctors disclosed being sexually harassed).

profession is not immune.⁶ In fact, the efforts to eliminate sexual harassment within the legal profession started over two decades ago.⁷

Considering the negative physical and psychological effects sexual harassment can have on victims,⁸ and the special position lawyers have in society,⁹ there exists a need for a rule forbidding such harassment within the legal profession. Texas, and other states,¹⁰ must follow the American

6. See Deborah L. Rhode, *The Unfinished Agenda: Women and the Legal Profession*, ABA COMM'N ON WOMEN IN THE PROFESSION 1, 19 (2001), <http://womenlaw.stanford.edu/pdf/aba.unfinished.agenda.pdf> [<https://perma.cc/2KKX-AJP5>] (“The most recent surveys find that between about half to two-thirds of female lawyers, and a quarter to half of female court personnel, report experiencing or observing sexual harassment.”).

7. See Lisa Pfenninger, *Sexual Harassment in the Legal Profession: Workplace Education and Reform, Civil Remedies, and Professional Discipline*, 22 FLA. ST. U. L. REV. 171, 214 (1994) (identifying the Clarence Thomas controversy, the Tailhook scandal, and Paula Jones’ claims against former president Bill Clinton in declaring sexual harassment an issue to be dealt with in 1994); see also Lazar, *supra* note 4 (“The ABA called upon members of the legal profession to provide leadership and education in eradicating sexual harassment At the time (1992), sexual harassment was cited as one explanation for the gender gap in high-level legal positions.”). The ABA currently intends to study why such a large volume of women leave the legal profession before becoming partners. See Hilarie Bass, *Plugging the Leaky Pipeline*, ABA JOURNAL, Nov. 2017, at 8, 8 (describing a two-part initiative hosted by the American Bar Association aimed at determining the “why” behind women leaving the legal profession). Although the study has not yet been conducted, there are commentators hypothesizing that sexual harassment and discrimination may be one reason for this phenomenon. *C.f.* Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 VAL. U. L. REV. 859, 896 (2005) (“Because women have not attained genuine integration, are relegated to less remunerative specialties, and are partnered at a lower rate, women are also overrepresented in what has sometimes been termed ‘flight from the law.’”); Marhoefer, *supra* note 4, at 833 (discussing how harassment may prompt a female attorney to leave her current job or the profession).

In a 1998 study that relied on statistical measures, overall job satisfaction for female lawyers who witnessed or experienced sexual harassment was significantly lower than for those who did not experience such harassment. . . . In the same study, female lawyers demonstrated a “clear propensity” to leave their current employer after witnessing or experiencing sexual harassment. Female attorneys who witnessed or experienced sexual harassment from a superior were 27 percent more likely to express an intention to quit their current employment within two years; when a colleague was the source of the harassment, female attorneys were almost 28 percent more likely to express the same “quit intention.”

Id. at 833 (footnotes omitted) (quoting David N. Laband & Bernard F. Lentz, *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers*, 51 INDUS. & LAB. REL. REV. 594, 599–605 (1998)).

8. *E.g.*, Nicole Spector, *The Hidden Health Effects Of Sexual Harassment*, NBC NEWS (Nov. 10, 2017, 12:30 PM), <https://www.nbcnews.com/better/health/hidden-health-effects-sexual-harassment-ncna810416> [<http://perma.cc/8NBJ-P8UW>] (“[W]e’ve learned that sexual harassment can wreak havoc on its victims, and can cause not only mental health issues, but physical effects as well.”).

9. See discussion *infra* Section II.C.

10. See TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 8.04, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9) (excluding any prohibition on harassment

Bar Association's lead and adopt a rule of professional responsibility declaring it misconduct for a lawyer to sexually harass another to meet the demand of the Texas Disciplinary Rules of Professional Conduct (Texas Disciplinary Rules), which requires a lawyer's actions to comport with ethics in order to ensure confidence in the profession.¹¹

After twenty-two years of attempts to promulgate a rule forbidding harassment within the legal profession, the American Bar Association finally approved such a rule in August of 2016.¹² Model Rule of Professional Conduct (Model Rule) 8.4 states:

It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.¹³

Further, the commentary to Model Rule 8.4 states, "Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence

or discrimination). *But see* IOWA RULES OF PROF'L CONDUCT R. 32:8.4 (2018) (categorizing sexual harassment or other unlawful discrimination as misconduct); MINN. RULES OF PROF'L CONDUCT R. 8.4 (2018) (indicating harassment on the basis of sex—among other things—is misconduct in Minnesota); OR. RULES OF PROF'L CONDUCT R. 8.4(a)(7) (2015) (prohibiting harassment of a person during the course of representation of a client); WIS. RULES OF PROF'L CONDUCT R. 20:8.4(i) (2017) (including harassment on the basis of sex in its rule of misconduct).

11. *E.g.*, TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 9 ("The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct."). The Preamble stresses the importance of maintaining confidence in the legal profession indicating that "[t]he possible loss of that respect and confidence is the ultimate sanction." *Id.*

12. *See* Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 201–14 (2017) (discussing the ABA Standing Committee on Ethics' push for a rule making it misconduct for a lawyer to harass in 1994). "On the ethical front, the profession has finally taken steps to better police itself, at least in regard to our ethics rules. The New York State Bar . . . revamped its Model Rules to add discrimination and harassment based on protected status to the list of categories of attorney misconduct." Lazar, *supra* note 4; MODEL RULES OF PROF'L CONDUCT R. 8.4 (AM. BAR ASS'N 2018); ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, *Report to the House Delegates: Resolution 109*, AM. B. ASS'N (Aug. 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf [<https://perma.cc/7JFT-94RA>] [hereinafter *Resolution 109*] (amending Rule 8.4 and Comment to include a prohibition on harassment and discrimination).

13. MODEL RULES OF PROF'L CONDUCT R. 8.4.

in the legal profession and the legal system. . . . Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct.”¹⁴

The addition of paragraph (g) is not without merit, to the contrary, its addition is imperative. A 2011 survey indicated that one in every four women experienced sexual harassment in the workplace.¹⁵ As mentioned earlier, sexual harassment causes mental, as well as physical, effects upon the victim.¹⁶ Psychological effects of harassment may include, “Anger, fear, self-consciousness or embarrassment[,] [d]ifficulty sleeping[, and] [l]oss of appetite.”¹⁷ Physical effects can include, “[M]uscle aches, headaches, or even chronic physical health problems such as high blood pressure and problems with blood sugar.”¹⁸ Clearly, the damaging effects of harassment warrant serious repercussions for lawyers who commit harassment, including sanctions. Lawyers, as members of a class held to strict standards of ethics, must be subject to a rule forbidding such behavior.

The Preamble to the Model Rules states, “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”¹⁹ Further, the Preamble states that a lawyer’s conduct ought to correspond to requirements of law in both professional activities and in the lawyer’s personal affairs.²⁰ This makes it clear that lawyers should hold themselves to the highest standards of ethics and professionalism in order to cultivate and maintain confidence in the profession because of the special position lawyers have in society.

14. *Id.* at cmt. 3. “Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.” *Id.*

15. *One in Four U.S. Women Reports Workplace Harassment*, ABC NEWS/WASHINGTON POST POLL 1,1 (Nov. 16, 2011, 12:01 AM), <http://www.langerresearch.com/wp-content/uploads/1130a2WorkplaceHarassment.pdf> [<https://perma.cc/5F7G-2DNN>]. Another poll found that fifty-four percent of American women have been sexually harassed in their lifetime. Claire Zillman, *A New Poll on Sexual Harassment Suggests Why ‘Me Too’ Went So Insanely Viral*, FORTUNE (Oct. 17, 2017) <http://fortune.com/2017/10/17/me-too-hashtag-sexual-harassment-at-work-stats/> [<https://perma.cc/9DR4-5VW4>]. “The poll found that, all told, 33 million U.S. women have been sexually harassed—and 14 million sexually abused—in work-related episodes.” *Id.*

16. Spector, *supra* note 8.

17. *Effects of Sexual Harassment*, STANFORD UNIVERSITY (last visited June 3, 2018), <https://harass.stanford.edu/be-informed/effects-sexual-harassment> [<https://perma.cc/ZZ49-E6QJ>].

18. Spector, *supra* note 8. A psychologist indicated that sexual harassment could cause heart issues in the long-term. *Id.*

19. MODEL RULES OF PROF'L CONDUCT preamble ¶ 1.

20. *Id.* ¶ 5.

The Model Rules, as the name suggests, are just that—a set of model rules for states to consider in framing rules of professional responsibility.²¹ Thus, each state maintains the discretion to shape the rules of professional conduct applicable to lawyers within its borders.²² The corresponding rule setting forth what constitutes misconduct in Texas is Rule 8.04.²³ However, the Texas misconduct rule is devoid of any of the language prohibiting a lawyer from engaging in harassment.²⁴ Moreover, there is nothing overtly discouraging lawyers from engaging in sexual harassment anywhere within the Texas Disciplinary Rules.²⁵ In fact, the commentary to Texas Disciplinary Rule 8.04 actively limits the scope of its purview, thereby barring any argument that sexual harassment falls under some other provision of the Texas Disciplinary Rules: “Rule 8.04 provides a *comprehensive* restatement of all forms of conduct that will subject a lawyer to discipline under either these Rules, the State Bar Act or the State Bar Rules.”²⁶ Given that Texas Disciplinary Rule 8.04 provides an exhaustive statement of what constitutes misconduct, the list should undoubtedly include a sexual harassment provision like its counterpart Model Rule 8.4(g). To appropriately bar all behavior constituting misconduct, as a matter of ethics, Texas must adopt a rule of professional conduct prohibiting sexual harassment within the legal profession.

The scope of this Comment is to provide three potential alternatives for Texas to consider in drafting and adopting a rule of professional responsibility to forbid sexual harassment within the legal profession. Part I of this Comment introduces the background necessitating a rule to forbid sexual harassment in the legal profession. Part II discusses how sexual harassment is dealt with in the legal profession in two respects. First, in the context of its commission by judges generally, and second, in the context of

21. *ABA Model Rules of Professional Conduct*, ABA (last visited June 3, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html [https://perma.cc/D4PY-24CM].

22. *Id.*

23. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9).

24. *Compare* MODEL RULES OF PROF'L CONDUCT R. 8.4 (declaring conduct that a lawyer knows or should know is harassment will constitute professional misconduct), *with* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04 (listing various acts which constitute misconduct, but not including harassment or discrimination).

25. *See generally* TEX. DISCIPLINARY RULES PROF'L CONDUCT (omitting any specific proscription against sexual harassment by attorneys).

26. *Id.* R. 8.04 cmt. 2 (emphasis added).

its commission by attorneys against clients. Part II also reviews the special responsibility of attorneys and how that responsibility relates to sexual harassment. Part III defines sexual harassment and describes how individuals are held accountable through civil liability and criminal punishment. Part IV reviews the Model Rules of Professional Conduct and discusses the adoption of Rule 8.4(g) by the American Bar Association in 2016 and the history leading to its implementation. Part V advances three potential alternatives for Texas to consider in adopting a rule to sanction sexual harassment. Lastly, Part VI concludes this Comment and reviews each proposed alternative.

II. SEXUAL HARASSMENT IN THE LEGAL PROFESSION

The primary purpose of this Comment is to effect a change in the manner in which sexual harassment is dealt with when lawyers commit it in light of the pervasiveness of sexual harassment within the legal profession.²⁷ Thus, it is important to understand how sexual harassment is sanctioned in other facets of the legal profession. First, what rules prohibit sexual harassment committed by judges and what punishment is imposed. Second, what rules bar a lawyer from sexually harassing his or her client and how lawyers are disciplined for such harassment.

A. *Sexual Harassment Committed by Judges*

“Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Above all things, *integrity* is their portion and proper virtue.”²⁸

Upon election or appointment, the first thing every new judge should do is “sit down and read the code of judicial conduct for [their] jurisdiction.”²⁹ Further, a judge should understand that the code of judicial conduct governs their activities both while on the bench and in their personal life.³⁰ The

27. *E.g.*, Rhode, *supra* note 6, at 19 (“Almost three-quarters of female lawyers believe that harassment is a problem in their workplaces.”). An additional concern is the lack of reporting of such sexual harassment; many women feel inclined to ignore the problem for fear of retaliation. *See id.* at 8 (“[S]urveys from a wide variety of occupational contexts find that few women, typically well under 10 percent, make any formal complaint; fewer still can afford the financial and psychological costs of litigation.”).

28. FRANCIS BACON, *ESSAYS & NEW ATLANTIS* 225 (Gordon S. Haight ed., Classics Club 1942) (1612) (emphasis added).

29. Cynthia Gray, *So You're Going to Be a Judge: Ethical Issues for New Judges*, 52 CT. REV. 80, 80 (2016).

30. *Id.*

Texas Code of Judicial Conduct “is intended . . . to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.”³¹ Texas Code of Judicial Conduct Canon 3 states:

A judge shall require order and decorum in proceedings before the judge. [And, a] judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge’s direction and control.³²

Although the plain language of this Canon of the Texas Code of Judicial Conduct does not explicitly forbid sexual harassment by judges,³³ a Review Tribunal of the Texas Supreme Court used Canon 3 to discipline a judge who made sexually offensive remarks and gestures toward assistant district attorneys practicing in his court.³⁴ Another Review Tribunal of the Supreme Court of Texas used Canon 2 to remove a judge from the bench for his sexually suggestive comments and behavior occurring in his judicial capacity.³⁵

According to the Texas Code of Judicial Conduct, the word “shall” is compulsory.³⁶ Thus, Canons 2 and 3, which prohibit impropriety or the

31. TEX. CODE JUD. CONDUCT, preamble ¶ 2, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. B (West 2013).

32. *Id.* Canon 3.

33. *Id.*

34. *See In re Barr*, 13 S.W.3d 525, 531–38 (Tex. Rev. Trib. 1999, no appeal) (removing a judge for his improper comments to female attorneys, including “[y]ou are so nice to look at, if you leave, all I’ll have to look at all afternoon are swinging dicks”). In the court’s discussion, it emphasized the importance of fostering and maintaining dignity and respect for the judiciary of the state. The court stated, “The Texas jurist must be held to the highest standards of integrity and ethical conduct . . .” *Id.* at 532.

35. *See In re Canales*, 113 S.W.3d 56, 62 (Tex. Rev. Trib. 2003, pet. denied) (accepting the recommendation of the state commission to remove the judge and bar him from ever holding judicial office in Texas again). Canon 2 of the Texas Code of Judicial Conduct states, “A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” TEX. CODE JUD. CONDUCT, Canon 2. The Tribunal reviewed the commission’s findings and agreed that the judge’s suggestive comments to attorneys in his court were inconsistent with his duties and “served to cast public discredit upon the judiciary or the administration of justice.” *In re Canales*, 113 S.W.3d at 62.

36. “‘Shall’ or ‘shall not’ denotes binding obligations the violation of which can result in disciplinary action.” TEX. CODE JUD. CONDUCT, Canon 8. It is worth noting that the violation of a Canon of the Code of Judicial Conduct does not itself create a basis for criminal or civil liability. *Id.* Thus, disciplinary action—against attorneys or judges—may serve as an appropriate middle ground for

appearance of impropriety³⁷ and require impartiality and diligence³⁸ set forth compulsory obligations the judge must perform.³⁹ Accordingly, the Canons governing judges effectively prohibit sexual harassment implicitly because sexual harassment is undoubtedly improper⁴⁰ and certainly violates decorum.⁴¹ Furthermore, the Preamble to the Code states, “The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards.”⁴² Unlike the Texas Rules of Disciplinary Conduct establishing what constitutes misconduct for attorneys—which is comprehensive⁴³—the Code of Judicial Conduct is expressly non-exhaustive.⁴⁴ Because the Code of Judicial Conduct declares itself non-exhaustive, and because Canon 2 and Canon 3 have successfully been used to discipline judges who have participated in sexual harassment, the Code of Judicial Conduct adequately addresses sexual harassment,⁴⁵ whereas the Texas Disciplinary Rules of Professional Conduct fails to do so.

someone who has been sexually harassed but does not desire to press criminal charges or does not have standing to assert a claim under Title VII or TCHRA.

37. *Id.* Canon 2.

38. *Id.* Canon 3.

39. *Id.* Canons 2, 3, 8.

40. *See Improperly*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“Behavior that is inappropriate or unacceptable under the circumstances; an inappropriate or unacceptable act or remark.”).

41. *See id. Decorum* (“Conduct that befits the dignity of a place or an occasion, esp. a formal one.”).

42. TEX. CODE JUD. CONDUCT, preamble ¶ 2.

43. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04 cmt. 2, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9).

44. TEX. CODE JUD. CONDUCT, preamble ¶ 2.

45. *See id.* (explaining the Code of Judicial Conduct is not designed to state comprehensive guidelines for judicial conduct); *In re Canales*, 113 S.W.3d 56, 62 (Tex. Rev. Trib. 2003, pet. denied) (concluding the judge's sexual comments violated Canon 2A of the Texas Code of Judicial Conduct); *In re Barr*, 13 S.W.3d 525, 531–38 (Tex. Rev. Trib. 1999, no appeal) (finding the judge's conduct violative of Canon 3B of the Texas Code of Judicial Conduct). Although there are means of sanctioning judges who sexually harass individuals, it has been suggested that the level of punishment imposed upon such judges is not up to par with the egregious nature of the conduct. *See* Marina Angel, *Sexual Harassment by Judges*, 45 U. MIAMI L. REV. 817, 817 (1991) (“Despite the seriousness of this conduct, however, sanctions imposed against offending judges have been surprisingly light. In a typical case, a judge found to have engaged in sexually harassing conduct receives nothing more than a censure, reprimand, or admonishment.”).

B. *Sexual Harassment Committed by Attorneys Against Clients*

Though there is no express language in the Texas Rules of Disciplinary Conduct forbidding an attorney from sexually harassing a client,⁴⁶ there are other means of sanctioning such conduct. For example, courts of differing states have used other means to punish such behavior where they lack a rule akin to Model Rule 8.4(g). There are a number of ways in which an attorney can possibly violate the rules of professional conduct by sexually harassing a client, including engaging in representation despite a concurrent conflict of interest⁴⁷ or by a breach of fiduciary duty.⁴⁸

A New Hampshire attorney agreed to a labor arrangement with a client in exchange for legal services he had performed for her.⁴⁹ While she was employed under this arrangement, the attorney made improper sexual comments to the client.⁵⁰ The attorney was disbarred for his violation of a rule prohibiting an attorney from representing a client where a concurrent conflict of interest exists—among other rules.⁵¹ The court analyzed the attorney's conduct under the rule forbidding a concurrent conflict of interest, stating “[t]his rule only requires the *possibility* that the client's interests may be materially limited by the lawyer's interest.”⁵² The court reasoned that the attorney knew his relationship with the client would put her at risk of being at fault in her divorce yet to be finalized.⁵³ In Louisiana, an attorney endeavored to create a sexual relationship with a client in exchange for his diligence as her counsel, a court held the attorney had violated the rule of professional conduct prohibiting an attorney from representing a client where a concurrent conflict of interest exists.⁵⁴ The court stated, “A lawyer is a fiduciary with a duty of loyalty, care, and

46. *See generally* TEX. DISCIPLINARY RULES PROF'L CONDUCT (excluding a rule forbidding an attorney from sexually harassing a client).

47. *See Conflict of Interest*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.”).

48. *See id. Fiduciary Duty* (“[A] duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer . . .) to the beneficiary (such as a lawyer's client . . .).”).

49. *Otis' Case*, 609 A.2d 1199, 1200–01 (N.H. 1992).

50. *Id.* at 1201.

51. *See id.* at 1202–03 (“The referee found that the respondent [Otis] ‘admitted that pursuit of a sexual relationship with Ms. B. would have put her at risk of creating fault grounds against her in the contested divorce.’”).

52. *Id.* at 1202.

53. *Id.* at 1201–03.

54. *In re Ashy*, 721 So. 2d 859, 866 (La. 1998).

obedience to the client. . . . Clearly, sexual harassment by a lawyer serves the lawyer's interest and not the client's."⁵⁵

Unlike Louisiana and New Hampshire, which have not adopted a rule equivalent to Model Rule 8.4(g), Iowa adopted a rule forbidding sexual harassment even before the American Bar Association adopted such a rule.⁵⁶ The rule previously stated, "An attorney shall not [e]ngage in sexual harassment or other unlawful discrimination on the basis of sex, race, national origin, or ethnicity in the practice of law or knowingly permit staff and agents subject to the lawyer's discretion and control to do so."⁵⁷ Thus, disciplining a lawyer who had taken nude photographs of his client⁵⁸ under this rule was much more straightforward than the analysis other courts have undertaken in disciplining a lawyer under a conflict of interest or breach of fiduciary duty. The court reasoned, "[T]he history of DR 1-102(A)(7) does not support a conclusion that its prohibitions are directed solely to an employment situation. Additionally, the rule itself is quite broad, referring to sexual harassment or discrimination 'in the practice of law.'"⁵⁹ Therefore, Iowa's rule, one of the three proposed rules for Texas' adoption, proscribes sexual harassment by an attorney against both colleagues and clients—making it an ideal rule.⁶⁰

55. *Id.*

56. Compare I.A. RULES OF PROF'L CONDUCT R. 8.4 (2018) (excluding any prohibition on harassment), and N.H. RULES OF PROF'L CONDUCT R. 8.4 (2018) (lacking any ban on harassment), with IOWA RULES OF PROF'L CONDUCT R. 32:8.4 (2018) ("It is professional misconduct for a lawyer to . . . engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer's discretion and control to do so.").

57. See Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Steffes, 588 N.W.2d 121, 124 n.1 (Iowa 1999) ("DR 1-102(A)(7) states that an attorney shall not [e]ngage in sexual harassment or other unlawful discrimination on the basis of sex, race, national origin, or ethnicity in the practice of law or knowingly permit staff and agents subject to the lawyer's direction and control to do so."). The language from the rule that appeared in the Iowa code of Professional Responsibility has changed since the adoption of the new rules in 2005. IOWA RULES OF PROF'L CONDUCT R. 32:8.4(g) ("It is professional misconduct for a lawyer to . . . engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer's direction to do so.").

58. See *Steffes*, 588 N.W.2d at 125 ("[W]e conclude the photographs were sexual in nature, taken to satisfy Steffes's own prurient interests. We hold, therefore, that Steffes violated DR 1-102(A)(7) by engaging in sexual harassment of his client.").

59. *Id.* (citing IOWA CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(7)).

60. The Texas Disciplinary Rules of Professional Conduct seek to attain the highest standards of ethics of lawyers. See TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 1, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9) ("A consequent obligation of lawyers is to maintain the highest standards of ethical conduct."). This requirement of the highest standard of ethical conduct includes conduct occurring during the course of representation. See *id.*

C. *A Lawyer's Special Responsibility*

There are several sources necessitating the utmost professionalism and the highest level of integrity of lawyers in Texas. Namely, the Texas Disciplinary Rules of Professional Conduct,⁶¹ the Oath each attorney must take before receiving their license to practice,⁶² and the Texas Lawyer's Creed.⁶³ Each of these demonstrate the special responsibility placed upon lawyers as a result of their admittance to the bar and the position they hold in society.

As practitioner of law, an attorney wears many hats.⁶⁴ The Preamble to the Model Rules of Professional Conduct and the Texas Disciplinary Rules of Professional Conduct both proclaim that a lawyer is a "public citizen having special responsibility for the quality of justice."⁶⁵ Further, the Preamble to the Texas Disciplinary Rules of Professional Conduct goes on to state, "Lawyers, as guardians of the law, play a vital role in the preservation of society. . . . A consequent obligation of lawyers is to maintain the highest standards of ethical conduct."⁶⁶ Additionally, the Preamble asserts, "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business

R. 1.02 (instructing lawyers to abide by a client's resolution concerning certain specified decisions); *id.* R. 1.03 (ordering reasonable communication between a lawyer and client). The requirement of the highest level of ethical conduct extends beyond a lawyer's duty to clients to the lawyer's duty to the court and opposing counsel as well. *See id.* R. 3.03 (forbidding lawyers from making false statements, omitting facts, or admitting false evidence to the court); *id.* R. 3.04 (prohibiting lawyers from obstructing access to or falsifying evidence).

61. *Id.* preamble ¶ 1 (noting the vital role lawyers play in society and stating "[t]he fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system").

62. TEX. GOV'T CODE ANN. § 82.037 (requiring each individual admitted to the Bar to take an oath).

63. TEXAS LAWYER'S CREED: A MANDATE FOR PROFESSIONALISM (emphasizing a lawyer's various duties, and acknowledging "that professionalism requires more than merely avoiding the violation of law and rules"). The Preamble, Oath, and Texas Lawyer's Creed do not form the basis by themselves of grounds for sanctions. The spirit of the rules, Oath, and Creed all presumably condemn sexual harassment by lawyers, but, because this issue is so prevalent and damaging, Texas must create a clear rule forbidding sexual harassment.

64. *See* MODEL RULES OF PROF'L CONDUCT preamble ¶ 1 (AM. BAR ASS'N 2018) (calling a lawyer "a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice."); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 1 (stating the same).

65. MODEL RULES OF PROF'L CONDUCT preamble ¶ 1; TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 1.

66. TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 1.

and personal affairs.”⁶⁷ As the Preamble makes clear, attorneys are held to high standards of ethical behavior because of the special role they play in society. Lawyers are sometimes called upon to help individuals at their most vulnerable moments and the profession acknowledges the special responsibility placed upon its practitioners by requiring the highest degree of ethics of them.⁶⁸

It follows from this strict requirement of ethical conduct that the profession should require the same degree of integrity in conduct directed at other members of the profession. In fact, before receiving a license to practice law a person is required to “take an oath that the person will . . . conduct oneself with integrity and civility in dealing and communicating with the court and all parties.”⁶⁹ Civility has many different definitions depending on who you ask or which dictionary you consult, but one definition of the concept is: “Politely circumspect behavior in personal interaction; propriety and courtesy in conduct; the absence of rudeness.”⁷⁰ Therefore, the Oath each lawyer must take before obtaining their license requires a lawyer to pledge to act with courtesy and without rudeness in personal conduct and interactions.

The Texas Lawyer’s Creed (the “Creed”)—promulgated by the Supreme Court of Texas and the Court of Criminal Appeals—declares, “A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should *always* adhere to the highest principles of professionalism.”⁷¹ Moreover, the introduction to the Creed states, “We must always be mindful that the practice of law is a profession. . . . Throughout the history of our nation, the members of our citizenry have looked to the ranks of our profession for leadership and guidance.”⁷² The Dallas Bar Association’s Lawyer’s Creed further illustrates this theme by

67. *Id.* ¶ 4.

68. *E.g., id.* ¶ 1 (“A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.”).

69. TEX. GOV’T CODE ANN. § 82.037(a)(4). In the Bill Analysis, Senator Watson wrote, “These ideas are central to the legal profession and match language added by at least 14 other states as part of a national movement emphasizing civility in the *legal profession*.” S. Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. S.B. 534, 84th Leg., R.S. (2015) (emphasis added). Though the Oath of Attorney uses the term “parties,” it seems—from the Bill Analysis—that the legislative intent was that the phrase be interpreted broadly enough to encompass not only clients but opposing counsel as well as other members of the legal profession. *Id.*

70. *Civility*, BLACK’S LAW DICTIONARY (10th ed. 2014).

71. TEXAS LAWYER’S CREED: A MANDATE FOR PROFESSIONALISM (emphasis added).

72. *Id.*

requiring the highest level of professionalism stating, “I recognize that my conduct is not governed solely by the Code of Professional Responsibility, but also by standards of fundamental decency and courtesy.”⁷³

Based upon the requirements of the Disciplinary Rules of Profession Conduct,⁷⁴ the oath each attorney must take before obtaining a license to practice law,⁷⁵ and the Texas Lawyer’s Creed,⁷⁶ it is clear that lawyers have a special responsibility⁷⁷ in society and that the standard of ethics is set very high for legal practitioners. It follows that the conduct of attorneys toward others in the legal profession should be held to that same strict standard. Therefore, a rule declaring sexual harassment as misconduct in the practice of law is necessary to fully address the pervasive issue of such harassment within the legal profession.

III. SEXUAL HARASSMENT AND ITS PENALTY

Sexual harassment, in the colloquial sense, is an offhand remark about someone’s body, teasing, or the sexual joke that falls flat to the recipient. But when does that comment, teasing, or joke violate the law? According to the United States Equal Employment Opportunity Commission (“EEOC”), “Harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).”⁷⁸ Although there are both civil and criminal avenues through which a victim may pursue legal recourse against their harasser or employer, these options are not a guaranteed success, and pursuit of such recourse may

73. See *Lawyer’s Creed*, DALLAS BAR ASS’N, <http://www.dallasbar.org/sites/default/files/Lawyers%20Creed.pdf> [<https://perma.cc/ZM4V-S6JE>] (adopting their own form of a creed on October 15, 1987).

74. See TEX. DISCIPLINARY RULES PROF’L CONDUCT preamble ¶ 1, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9) (stressing the requirement that lawyers preserve the “highest standards of ethical conduct”).

75. See TEX. GOV’T CODE ANN. § 82.037 (setting forth the oath and demanding integrity and civility).

76. TEXAS LAWYER’S CREED: A MANDATE FOR PROFESSIONALISM.

77. See TEX. DISCIPLINARY RULES PROF’L CONDUCT preamble ¶ 1 (instructing lawyers on their special duties to society).

78. *Sexual Harassment*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, https://www.eeoc.gov/laws/types/sexual_harassment.cfm [<https://perma.cc/YFB4-ASQJ>]. “Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person’s sex. For example, it is illegal to harass a woman by making offensive comments about women in general. Both victim and harasser can be either a woman or a man . . .” *Id.*

result in the loss of the victim's job or worse.⁷⁹ Because legal recourse may not always be preferable for victims, the Disciplinary Rules of Professional Conduct ought to provide another means of handling harassment in the context of the legal profession.

A. *What Is Sexual Harassment?*

Sexual harassment is defined as, “[U]ninvited and unwelcome verbal or physical behavior of a sexual nature especially by a person in authority toward a subordinate (such as an employee or student).”⁸⁰ At this point in time, it seems as if it is impossible to turn on a television or look at a cell phone without being confronted by another shocking story containing allegations of sexual harassment against some prominent person.⁸¹

79. See Complaint at 19–24, *Chechelnsky v. Mcelroy, Deutsch, Mulvaney & Carpenter, LLP*, No. 15-CV-0177 (S.D.N.Y. Mar. 10, 2015) (complaining victim's firm discriminated against her based on her gender and detailing the extent of misconduct against her); see also David Margolick, *Curbing Sexual Harassment in the Legal World*, N.Y. TIMES (Nov. 9, 1990), <http://www.nytimes.com/1990/11/09/news/curbing-sexual-harassment-in-the-legal-world.html?pagewanted=all> [<https://perma.cc/L5LA-4222>] (“In October and November 1987 . . . Ms. Donahue told partners at the firm about Mr. Myslawiec's conduct. But the harassment continued . . . and within a few weeks the firm 'retaliated' by giving her a marginal performance evaluation . . .”).

80. *Sexual Harassment*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sexual%20harassment> [<https://perma.cc/EW3Y-25LY>]. Alternatively, Black's Law Dictionary defines sexual harassment as, “A type of employment discrimination consisting in verbal or physical abuse of a sexual nature, including lewd remarks, salacious looks, and unwelcome touching.” *Sexual Harassment*, BLACK'S LAW DICTIONARY (10th ed. 2014).

81. It seems there is a new story each day reporting allegations of sexual harassment and assault. See Dan Corey, *Since Weinstein, Here's a Growing List of Men Accused of Sexual Misconduct*, NBC NEWS (Nov. 24, 2017, 7:43 AM), <https://www.nbcnews.com/storyline/harvey-weinstein-scandal/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546> [<https://perma.cc/L2BG-X636>] (listing Ben Affleck, George H.W. Bush, Dustin Hoffman, as well as Jeffrey Tambor and others as men accused of sexual harassment and assault in the wake of the Weinstein scandal); see also Nicholas Fandos, *Al Franken Issues Apology After Accusation of Forcible Kissing and Groping*, N.Y. TIMES (Nov. 16, 2017), <https://www.nytimes.com/2017/11/16/us/politics/al-franken-sexual-harassment-groping-forcible-kissing.html> [<https://perma.cc/B17N-HP1Z>] (reporting Franken groped and kissed a woman in 2006); Amy Kaufman et al., *Russel Simmons and Brett Ratner Face New Allegations of Sexual Misconduct*, L.A. TIMES (Nov. 19, 2017), <http://www.latimes.com/business/hollywood/la-fi-brett-ratner-russell-simmons-20171119-htmlstory.html> [<https://perma.cc/XST5-XAB8>] (describing how Ratner and Simmons took a seventeen-year-old girl to dinner and later to Simmons' apartment where Simmons ripped off her clothes and forced her to perform fellatio while Ratner watched); Rich Schapiro, *Cuomo Aide Sexually Harassed Woman for Nearly a Year—and State Ignored Her Complaints, Lawsuit Says*, DAILY NEWS-NEW YORK (Nov. 18, 2017, 11:35 PM), <http://www.nydailynews.com/new-york/ex-cuomo-aide-sexually-harassed-woman-year-suit-article-1.3642911> [<https://perma.cc/AQ78-LJ6V>] (“Lisa Marie Cater says in a blistering federal court lawsuit that Sam Hoyt forcefully kissed and groped her during multiple unwanted visits to her home, sent her naked pictures of himself and even grabbed her crotch.”). Some of these accusers have taken additional steps such as filing suit against

With the overabundance of examples in the media of unacceptable conduct, it ought to be clear where the line is drawn as to what constitutes sexual harassment.⁸² However, the continued presence of sexual harassment in modern society is undeniably pervasive.⁸³

In the legal context, harassment is criminal in Texas if “A person . . . with intent to harass, annoy, alarm, abuse, torment, or embarrass another . . . initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene[.]”⁸⁴ Further, under both federal and Texas law, conduct that is “sufficiently severe or pervasive [so as] ‘to alter the conditions of [the victim’s] employment and create an abusive working environment’” is one form of sexual harassment: hostile work environment.⁸⁵ A second category of sexual harassment, *quid pro quo* sexual harassment, “is directly linked to the grant or denial of an

their harasser or attacker. See Amy Kaufman, *Ex-‘Bachelorette’ Segment Producer Discusses Why She Sued Warner Bros., Alleging Sexual Harassment*, L.A. TIMES (Oct. 30, 2017, 7:15 PM), <http://www.latimes.com/entertainment/tv/la-et-st-the-bachelor-sexual-harassment-lawsuit-becky-steenhoek-20171030-story.html> [<https://perma.cc/ZSV8-PQPJ>] (stating in her complaint that producers asked her inappropriate questions such as, “Is your vagina shaved?” and “Have you ever fondled [testicles] before?”). Others who have kept silent for years have only just spoken up about their experiences in light of the Weinstein scandal. See *Dustin Hoffman Accused of Sexual Harassment by Second Woman*, FOX NEWS (Nov. 3, 2017), <http://www.foxnews.com/entertainment/2017/11/03/dustin-hoffman-accused-sexual-harassment-by-second-woman.html> [<https://perma.cc/XZ5F-ZFMM>] (discussing the accusations of two women against Dustin Hoffman that allegedly took place in 1985 and 1991).

82. See EXXON MOBIL, STANDARDS OF BUSINESS CONDUCT 21 (Apr. 2017), http://cdn.exxonmobil.com/~media/global/files/other/2017/standards-of-business-conduct_apr.pdf [<https://perma.cc/SUS9-XVSJ>] (“Forms of harassment include, but are not limited to, unwelcome verbal or physical advances and sexually, racially, or otherwise derogatory or discriminatory materials, statements, or remarks. All employees, including supervisors and managers, will be subject to disciplinary action up to and including termination for any act of harassment.”).

83. See *Charges Alleging Sexual Harassment FY 2010–FY 2016*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm [<https://perma.cc/5NR5-PPE9>] (highlighting the consistently high number of sexual harassment claims with 6,758 claims being filed in 2016 alone). When looking at these statistics, it is important to remember that not every victim of sexual harassment reports the incident. See Stefanie K. Johnson, Jessica Kirk, & Ksenia Keplinger, *Why We Fail to Report Sexual Harassment*, HARV. BUS. REV. (Oct. 4, 2016), <https://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment> [<https://perma.cc/53HC-Z4FM>] (“[A] 2015 survey showed that 71% of women do not report sexual harassment, and far fewer bystanders report harassment that they have witnessed.”). Three factors have advanced to potentially explain why sexual harassment incidents remain largely unreported: fear of retaliation, the bystander effect, and masculine culture. *Id.*

84. TEX. PENAL CODE ANN. § 42.07(a)(1).

85. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (alterations in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

economic *quid pro quo*, where ‘such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.’⁸⁶ The EEOC provides more guidance on the issue of sexual harassment.⁸⁷

1. Title VII Civil Rights Act of 1964⁸⁸

Most racial and sexual harassment claims are brought under Title VII of the Civil Rights Act of 1964

. . . .

During the 1990s, the courts and legal commentators differentiated between ‘quid pro quo’ sexual harassment and ‘hostile work environment’ sexual harassment. This distinction was ‘between cases in which threats are carried out and those where they are not or are absent altogether.’⁸⁹

Where sexual harassment occurs in violation of Title VII of the Civil Rights Act of 1964,⁹⁰ the victim must file a charge with the EEOC within the filing deadlines.⁹¹ After the charge is filed, the EEOC will send notice

86. *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a)(3) (1981)).

87. *E.g.*, *Policy Guidance on Current Issues of Sexual Harassment*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/policy/docs/currentissues.html> [<https://perma.cc/T9JE-GTUD>] (outlining guidance for “determining whether sexual conduct is ‘unwelcome’; evaluating evidence of harassment; determining whether a work environment is sexually ‘hostile’; holding employers liable for sexual harassment by supervisors; and evaluating preventative and remedial action taken in response to claims of sexual harassment.”).

88. 42 U.S.C. § 2000e et seq. (2012). Title VII of the Civil Rights Act of 1964 encompasses sexual harassment. *See* *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 804 (Tex. 2010) (“Sexual harassment is a recognized cause of action under Title VII and the TCHRA, and Texas courts look to analogous federal law in applying the state Act.” (footnotes omitted) (citing *Hoffman-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 445–46 (Tex. 2004); *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001); *Specialty Retailers, Inc. v. DeMoranville*, 933 S.W.2d 490, 492 (Tex. 1996) (per curiam))).

89. DEBRA S. KATZ & ALAN R. KABAT, *HARASSMENT IN THE WORKPLACE* 2, 7 (2004), https://www.kmblegal.com/wp-content/uploads/2004_ABA_July_harassment_outline.pdf [<https://perma.cc/U43A-M6DU>].

90. “[A] violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment.” *Meritor*, 477 U.S. at 62. “Title VII of the Civil Rights Act of 1964 makes it ‘an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.’” *Id.* at 63 (quoting 42 U.S.C. § 2000e–2(a) (2012)).

91. *How to File a Charge of Employment Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employees/howtofile.cfm> [<https://perma.cc/KG7Y-YJTN>].

to the victim's employer of the charge and—in some instances—the EEOC “will ask both [the victim] and the employer to take part in [the EEOC's] mediation program.”⁹² If mediation is not requested or fails, the EEOC will typically request a written response to the charge from the employer.⁹³ The EEOC will then investigate the charge and further action depends upon the results of the investigation.⁹⁴ If issued a notice of right to sue letter (Notice of Right to Sue), a victim may then pursue legal action against his or her employer.⁹⁵

B. *How Are People Held Accountable?*

When a person has been sexually harassed there are a number of ways the person can address the issue. First, where a person's employer qualifies under Title VII,⁹⁶ the person may file a lawsuit against their employer after

“Where the discrimination took place can determine how long you have to file a charge. The 180-calendar-day filing deadline is extended to 300-calendar days if a state or local agency enforces a state or local law that prohibits employment discrimination on the same basis.” *Id.*; see also *Time Limits For Filing a Charge*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/employees/timeliness.cfm> [<https://perma.cc/2LPH-T7HR>] (explaining how a new deadline starts each time a discriminatory event takes place allowing the victim more time to timely file their complaint).

92. *What You Can Expect After You File a Charge*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/employees/process.cfm> [<https://perma.cc/WD7Y-6B94>].

93. *Id.*

94. *Id.* The EEOC describes the process after filing a charge as:

If we aren't able to determine that the law was violated, we will send you a Notice of Right to Sue. . . . If we determine the law may have been violated, we will try to reach a voluntary settlement with the employer. If we cannot reach a settlement, your case will be referred to our legal staff . . . who will decide whether the agency should file a lawsuit. If we decide not to file a lawsuit, we will give you a Notice of Right to Sue.

Id.

95. See *Filing a Lawsuit*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/employees/lawsuit.cfm> [<https://perma.cc/A2WL-U783>] (“We will give you a Notice of Right to Sue at the time the EEOC closes its investigation. . . . This notice gives you permission to file a lawsuit in federal or state court.”). A victim must file suit within ninety days after receipt of a Notice of Right to Sue from the EEOC. *Id.*

96. 42 U.S.C. § 2000e(b) (2012); see also *Coverage*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/employees/coverage.cfm> [<https://perma.cc/W5V5-2RXK>] (“An employer must have a certain number of employees to be covered by the laws we [the EEOC] enforce. This number varies depending on the type of employer . . . and the kind of discrimination alleged . . .”); *Coverage of Business/Private Employers*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/employees/coverage_private.cfm [<https://perma.cc/C49B-7J9G>] (explaining public and private businesses are governed by Title VII if the business has fifteen or more employees who have worked for the business for a minimum of twenty weeks); *Coverage of State and Local*

receiving a Notice of Right to Sue from the EEOC.⁹⁷ This claim may be based on two different kinds of harassment: hostile work environment⁹⁸ or quid pro quo sexual harassment.⁹⁹ Second, the person may file a lawsuit against their employer under the Texas Commission on Human Rights Act after receiving a Notice of Right to Sue from the Texas Workforce Commission Civil Rights Division.¹⁰⁰ Third, the person may pursue tort claims against their harasser individually.¹⁰¹ Fourth, the person may report the unwanted conduct to law enforcement¹⁰² so that criminal charges may be brought against the harasser individually. Fifth, like many people choose to do, the victim may stay silent.¹⁰³ Which avenue a person elects to take regarding their experience with sexual harassment may depend on a variety

Governments, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/coverage_state_local.cfm [<https://perma.cc/KS5M-FXPJ>] (instructing state and local government agencies are governed by Title VII if the agency has fifteen or more employees who have worked at the agency for a minimum of twenty weeks); *Coverage of Federal Government Agencies*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/coverage_federal.cfm [<https://perma.cc/C2NM-TS7V>] (noting federal government agencies have no prerequisites—"all federal agencies are covered"); *Coverage of Employment Agencies*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/coverage_employment_agencies.cfm [<https://perma.cc/KCC5-JYKS>] (stating employment agencies are covered by Title VII if the agency engages in referral of employees to employers); *Coverage of Labor Unions and Joint Apprenticeship Committees*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/coverage_union.cfm [<https://perma.cc/62FW-5LRC>] (indicating all labor organizations are governed by Title VII if the union has a minimum of fifteen members).

97. *E.g.*, *Filing a Lawsuit*, *supra* note 95 (outlining the time limitation on filing suit and describing how a victim may file a lawsuit before the EEOC's investigation is complete).

98. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 18 (1993) (addressing a hostile work environment claim).

A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. . . . We therefore believe the District Court erred in relying on whether the conduct 'seriously affect[ed] plaintiff's psychological well-being' or led her to 'suffe[r] injury.'

Id. at 22 (alterations in original). The Court reaffirmed a middle-ground standard "between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Id.* at 21.

99. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (quid pro quo sexual harassment is harassment "directly linked to the grant or denial of an economic" benefit).

100. TEX. LAB. CODE ANN. §§ 21.001, .003, .051.

101. *See* discussion *infra* Section III.B.2.b.

102. TEX. PENAL CODE ANN. § 42.07.

103. *See Johnson, Kirk & Keplinger*, *supra* note 83 ("[A] 2015 survey showed that 71% of women do not report sexual harassment, and far fewer bystanders report harassment that they have witnessed.").

of factors: (1) whether their employer is governed by federal or state anti-discrimination laws;¹⁰⁴ (2) the identity of their harasser, i.e., whether the harasser is the victim's superior or coworker; (3) what type of discrimination the victim has been subject to;¹⁰⁵ (4) whether the harasser acted with authority;¹⁰⁶ (5) the victim's personal considerations—including whether reporting such conduct will subject the victim to more harassment or whether the harasser will retaliate against the victim.¹⁰⁷

1. Civil Liability Under Title VII

An employee must establish four elements to prove a *prima facie* case for a hostile work environment under Title VII of the Civil Rights Act of 1964.¹⁰⁸ First, the employee must demonstrate that “the employee belongs to a protected class.”¹⁰⁹ Second, the employee must show that “the

104. *Coverage*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employees/coverage.cfm> [<https://perma.cc/W5V5-2RXX>].

105. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (illustrating what constitutes “quid pro quo” sexual harassment); *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (stating the question whether an employment “environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance”).

106. *See* RESTATEMENT (THIRD) OF AGENCY § 2.01 (AM. LAW INST. 2006) (defining “actual authority”); *id.* at § 2.02 (outlining the scope of actual authority); *id.* at § 2.03 (describing apparent authority); *id.* at § 2.04 (explaining “respondent superior”).

107. *See Johnson, Kirk & Keplinger*, *supra* note 83 (listing “fear of retaliation, the bystander effect, and masculine culture” as potential factors reducing the likelihood that a victim will report their experience).

108. *See Pfenninger*, *supra* note 7 at 183–84 (listing required elements of Title VII claims for sexual harassment). Once established, there is burden shifting between plaintiff and defendant.

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (citations omitted) (citing FED. R. CIV. P. 8(c)).

109. *Sanders v. Christus Santa Rosa PASC*, 995 F. Supp. 2d 626, 632 (W.D. Tex. 2014) (quoting *Donaldson v. CDB, Inc.*, 335 Fed. App'x. 494, 501 (5th Cir. 2009)). *But see Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (“Title VII’s prohibition of discrimination ‘because of . . . sex’ protects men as well as women” (quoting *Newport News Shipbuilding & Dry Dock Co. v.*

employee was subject to unwelcome sexual harassment.”¹¹⁰ Third, the employee must prove that the harassment complained of was “based on sex.”¹¹¹ Fourth, the employee must show that the harassment complained of “affected a term, condition, or privilege of employment.”¹¹² The Supreme Court has also recognized another form of harassment—quid pro quo harassment—that will also state a claim under Title VII.¹¹³ “In response to a hostile-work environment claim, a defendant may assert the *Ellerth/Faragher* affirmative defense.”¹¹⁴ Where a plaintiff-employee establishes the four elements laid out above, and where defendant’s affirmative defenses—if asserted—fail, the plaintiff may be awarded compensatory and punitive damages, but those damages are capped depending on the size of the employer’s staff.¹¹⁵

EEOC, 462 U.S. 669, 682 (1983)). *Oncale* was the first time the Supreme Court recognized a cause of action within the context of same-sex sexual harassment. *Id.* at 75.

110. *Sanders*, 995 F. Supp. 2d at 632 (quoting *Donaldson*, 335 Fed. App’x. at 501); *see also Meritor*, 477 U.S. at 68 (noting “[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her participation in them was voluntary”).

111. *Sanders*, 995 F. Supp. 2d at 632 (quoting *Donaldson*, 335 Fed. App’x. at 501). *But see Oncale*, 523 U.S. at 78 (recognizing Title VII’s prohibition on discrimination protects both men and women).

112. *Sanders*, 995 F. Supp. 2d at 632 (quoting *Donaldson*, 335 Fed. App’x. at 501); *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Scalia, J., concurring) (“Accepting *Meritor*’s interpretation of the term ‘conditions of employment’ as the law, the test is not whether work has been impaired, but whether working conditions have been discriminatorily altered.”).

113. *See Meritor*, 477 U.S. at 65 (“[T]he Guidelines provide that such sexual misconduct constitutes prohibited ‘sexual harassment,’ whether or not it is directly linked to the grant or denial of an economic *quid pro quo* . . .”).

114. *Sanders*, 995 F. Supp. 2d at 633. Describing an affirmative defense to liability as:

Under *Ellerth/Faragher*, an employer may raise an affirmative defense to liability, by showing: (1) the employer exercised reasonable care to prevent and correct promptly any sexually-harassing behavior; and (2) the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm or otherwise.

Id. (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998)).

115. *See Remedies for Employment Discrimination*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/employees/remedies.cfm> [<https://perma.cc/YU45-LVUM>] (“There are limits on the amount of compensatory and punitive damages a person can recover. These limits vary depending on the size of the employer.”). Damages against an employer with more than fifteen but less than 100 employees are limited to \$50,000. *Id.* For employers with more than 101 employees but less than 200 employees, the damage limit is \$100,000. *Id.* The limit for employers with more than 201 employees but less than 500 employees is set at \$200,000. *Id.* The damage limit is set at \$300,000 for employers with more than 500 employees. *Id.*

2. Civil Liability Under State Law—TCHRA and Tort Claims

There are a number of civil theories under which a victim could pursue legal action against their harasser individually or their employer individually including: bringing a claim against the victim's employer under the Texas Commission on Human Rights Act (TCHRA), or bringing a tort claim against the employee-harasser individually—just to name a couple. But, bringing legal action under these theories is not without difficulty.

a. TCHRA Claims

Like Title VII, the TCHRA provides that it is unlawful for an employer:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.¹¹⁶

When the TCHRA applies, Texas courts look to analogous federal law in applying the state Act.¹¹⁷ Therefore, plaintiffs seeking to recover under TCHRA must keep in mind the exhaustion requirements¹¹⁸ and filing deadlines¹¹⁹ like that of Title VII.¹²⁰ Additionally, where a plaintiff does

116. 42 U.S.C. § 2000e-2(a) (2012). *See also* TEX. LAB. CODE ANN. § 21.051 (declaring what constitutes unlawful discrimination by employers in Texas).

117. *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001). “The relevant parts of the TCHRA are patterned after Title VII of the federal Civil Rights Act. Thus, we would ordinarily look to federal precedents for interpretive guidance to meet the legislative mandate that the TCHRA is intended to ‘provide for the execution of the policies of Title VII.’” *Id.* at 474 (quoting LAB. § 21.001(1)).

118. *See* LAB. § 21.252(d) (providing a person may file a civil suit after receiving notice).

119. *See id.* § 21.202 (establishing a statute of limitations on claims alleging unlawful employment practices).

120. *See* 42 U.S.C. § 2000e-5(b) (“Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . the Commission shall serve a notice of the charge . . . on such employer . . . and shall make an investigation thereof.”). “If the Commission determines after such investigation that there is reasonable cause to believe the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” *Id.*; *see also id.* § 2000e-5(e) (instituting a statute of limitations on Title VII claims).

succeed on a sexual harassment claim under TCHRA, there are caps on recoverable damages as there are in the federal counterpart.¹²¹

b. Tort Claims

Where a victim's employer is not covered by the TCHRA, the victim could potentially take legal action against their harasser individually. Causes of action a plaintiff could pursue include—but are not limited to—intentional infliction of emotional distress,¹²² and sometimes assault¹²³ and

121. Compare 42 U.S.C. § 1981a(b) (limiting compensatory damages based on the number of individuals employed), with LAB. § 21.2585 (diminishing total compensatory damages recoverable based on the size of the employer).

122. See *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 611 (Tex. 1999). The opinion reads:

An employee may recover damages for intentional infliction of emotional distress in an employment context as long as the employee establishes the elements of the cause of action. To recover damages for intentional infliction of emotional distress, a plaintiff must prove that: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the actions of the defendant caused the plaintiff emotional distress; and (4) the resulting emotional distress was server.

Id. (citations omitted) (citing *Wornick Co. v. Casas*, 856 S.W.2d 732, 734 (Tex. 1993); *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 65 (Tex. 1998)). Ultimately, a plaintiff will face difficulties in succeeding on a claim of intentional infliction of emotional distress. See, e.g., Jared P. Hanson, *The Search for Adequate Remedies for the Sexual Harassment Plaintiff in Arizona*, 25 ARIZ. ST. L.J. 671, 689 (1993) (discussing how Title VII and ACRA—the equivalent of TCHRA—require the victim to show that the harassment was motivated by the victim's gender and the difficulties attendant to such a burden). “As a result, the tort of intentional infliction of emotional distress is important for plaintiffs that find it difficult to prove that the harassment they suffered was motivated by their gender. . . . The tort of intentional infliction of emotional distress, however, also has several disadvantages for victims” *Id.* Like Texas, Arizona follows the Restatement (Second) of Torts elements of intentional infliction of emotional distress. See *Twyman v. Twyman*, 855 S.W.2d 619, 622 (Tex. 1993) (following the Restatement (Second) of Torts' outline of intentional infliction of emotional distress); *Ford v. Revlon*, 734 P.2d 580, 585 (Ariz. 1987) (“The Restatement of Torts recognizes that conduct which is extreme and outrageous may cause severe emotional distress for which one may be subject to liability. . . . We have followed this standard for liability.” (citing RESTATEMENT (SECOND) OF TORTS § 46(1) (AM. LAW INST. 1965); *Continental Life & Accident Co. v. Songer*, 603 P.2d 921 (Ariz. Ct. App. 1979); *Rosales v. City of Eloy*, 593 P.2d 688 (Ariz. Ct. App. 1979))).

123. See *Wal-Mart Stores, Inc. v. Odem*, 929 S.W.2d 513, 521 (Tex. App.—San Antonio 1996, writ denied) (“[T]he definition of assault, whether in a criminal or civil trial, is the same.” (citing *Moore's, Inc. v. Garcia*, 604 S.W.2d 261, 264 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.))). The opinion reads:

‘A[ssault]’ is defined as (1) intentionally, knowingly, or recklessly causing bodily injury to another; (2) intentionally or knowingly threatening another with imminent bodily injury; or (3) intentionally or knowingly causing physical contact with another when he or she knows or should reasonably believe that the other will regard the contact as offensive or provocative.

Id. at 521.

battery.¹²⁴ With each of these claims, the plaintiff will face difficulty, which makes a disciplinary rule desirable in the context of sexual harassment within the legal field.

3. Criminal Punishment

Another avenue a victim could elect to take regarding sexual harassment is to report the harassment to law enforcement. The Texas Penal Code criminalizes harassment stating, “A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person . . . initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene”¹²⁵ The Texas Penal Code goes on to define obscene as, “[C]ontaining a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function.”¹²⁶ Commission of harassment under the Texas Penal Code is a Class B misdemeanor¹²⁷ unless the harasser has already been convicted of harassment, in which case it is a Class A misdemeanor.¹²⁸ However, with the harsher punishment accompanying the criminal avenue comes a higher burden of proof,¹²⁹ which may dissuade a victim from even pursuing this avenue. Furthermore, the harassment statute requires proof of “intent to harass, annoy, alarm, abuse, torment, or embarrass another,”¹³⁰ which may prove to be a difficult task.

124. “Under the Penal Code [section 22.01(a)], the common law actions of assault and battery are addressed simply as assault.” *Baribeau v. Gustafson*, 107 S.W.3d 52, 60 (Tex. App.—San Antonio, 2003, pet. denied) (citing TEX. PENAL CODE ANN. § 22.01(a)). “Therefore, battery occurs when a person ‘intentionally, knowingly, or recklessly causes bodily injury to another[.]’” *Id.* at 60–61 (citing PENAL § 22.01(a)).

125. PENAL § 42.07(a)(1).

126. *Id.* § 42.07(b)(3).

127. *Id.* § 42.07(c). Conviction of a Class B misdemeanor is punishable by a fine of not more than \$2,000, confinement in jail for not more than 180 days, or both. *Id.* § 12.22; *see also id.* § 12.21 (“An individual adjudged guilty of a Class A misdemeanor shall be punished by . . . a fine not to exceed \$4,000[,] confinement in jail for a term not to exceed one year[,] or both such fine and confinement.”).

128. *Id.* § 42.07(c); *see also id.* § 42.07(c)(2)(A) (adding a subsection elevating the offense from a Class B misdemeanor to a Class A misdemeanor if the actor committed the offense against a minor under eighteen years of age).

129. *See id.* § 2.01 (requiring the prosecutor to prove every element of the offense charged beyond a reasonable doubt).

130. *Id.* § 42.07(a). Proof of intent to harass or annoy would require a showing that it was the harasser’s conscious objective or desire to harass or annoy the victim or to cause the victim to be harassed. *Id.* § 6.03(a). This requirement of culpability coupled with the steep burden of proof—

Accordingly, where sexual harassment occurs in the legal profession, a rule of professional responsibility prescribing such conduct is desirable because of the various difficulties attendant to each of the aforementioned avenues of recourse. Therefore, Texas and other states must adopt a rule of professional responsibility prohibiting sexual harassment in the practice of law.

IV. AMERICAN BAR ASSOCIATION MODEL RULE 8.4(G) AND ITS HISTORY

A. *Model Rules and Comments*

The ultimate goal in crafting the Model Rules of Professional Conduct was to provide a coherent set of rules—comprehensible to both the public and practitioners.¹³¹ The result of such efforts created a collection of rules governing American lawyer's which require ethical behavior and the highest standards of professionalism.¹³² Further, "The Rules are . . . partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. . . . Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules."¹³³ Every state but California has adopted rules of professional conduct mirroring the format set forth by the American Bar Association.¹³⁴

beyond a reasonable doubt—might present difficulty, especially if the victim has not kept records of the sexual harassment. *Compare id.* (defining culpable states of mind), *with id.* § 2.01 (establishing the burden of proof). *But cf.* Jasper v. State, No. 01-12-00799-CR, 2014 WL 265699, at *3 (Tex. App.—Houston [1st Dist.] Jan. 23, 2014, no pet.) (mem. op., not designated for publication) ("Intent can be inferred from circumstantial evidence. The evidence establishes that appellant had, for a number of months, called Crystal vulgar names in telephone conversations and in person." (emphasis added) (citations omitted) (citing Blount v. State, 961 S.W.2d 282, 284 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd))). The evidence was sufficient to convict appellant in the aforementioned case because the victim had kept records of appellant's harassment for months, but that may not always be feasible or obvious for a victim to do. *Id.*

131. Robert W. Meserve, *Commission on Evaluation of Professional Standards: Chair's Introduction*, AM. BAR ASS'N (Sep. 1983), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chair_intro.authcheckdam.pdf [https://perma.cc/4W48-3R9U].

132. *Id.*

133. MODEL RULES OF PROF'L CONDUCT scope ¶ 14 (AM. BAR ASS'N 2018).

134. *ABA Model Rules of Professional Conduct: About the Model Rules*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html [https://perma.cc/GP7F-56CS].

B. *Model Rule 8.4(g)*

The pertinent part of Model Rule 8.4(g) states, “It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . sex . . . in conduct related to the practice of law.”¹³⁵ The commentary to Model Rule 8.4 elucidates why such discrimination and harassment constitutes misconduct: “Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others.”¹³⁶ The commentary also goes on to give examples of what constitutes sexual harassment under Model Rule 8.4(g): “Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).”¹³⁷ Additionally, the commentary clarifies what is meant where the rule prohibits sexual harassment in “[c]onduct related to the practice of law.”¹³⁸ The commentary reads:

Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.¹³⁹

Since the passage of Rule 8.4(g) in August 2016, there has been ample scholarly debate.¹⁴⁰ Regardless of which side of the debate a person falls

135. MODEL RULES OF PROF'L CONDUCT R. 8.4.

136. *Id.* at cmt. 3.

137. *Id.*

138. *Id.* at cmt. 4.

139. *Id.*

140. *E.g.*, Caleb C. Wolanek, Note, *Discriminatory Lawyers in a Discriminatory Bar: Rule 8.4(G) of the Model Rules of Professional Responsibility*, 40 HARV. J.L. & PUB. POL'Y 773, 774–75 (2017) (“There are two opposing reactions to . . . Rule [8.4(g)]. Some argue it is needed to prevent sexual harassment, invidious discrimination, and other evils. Others criticize the Rule, claiming it will suffocate vigorous advocacy and exclude unpopular views from the legal profession.”).

on, it is unquestionable that the legal profession has a strong interest in preventing and punishing harassment and discrimination.¹⁴¹ The American Bar Association has recognized the recurring issue of sexual harassment and has been making efforts to promulgate a rule such as 8.4(g) for over two decades.¹⁴² Texas, like the American Bar Association, should acknowledge the glaring issue of sexual harassment and amend Rule 8.04 accordingly.

C. *History Behind Model Rule 8.4(g)*

Since as early as 1994, the American Bar Association has proposed anti-discrimination and anti-bias amendments to the Model Rules.¹⁴³ In 1995, the American Bar Association's Young Lawyers Division made another attempt to pass an anti-harassment and anti-discrimination amendment.¹⁴⁴ Rather than proposing a disciplinary rule, the Young Lawyers Division proposed an "aspirational resolution" at the annual meeting which ultimately passed.¹⁴⁵ In 1998, the American Bar Association's Standing Committee on Ethics proposed a comment to Rule 8.4(d), which stated:

A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).¹⁴⁶

141. See Gillers, *supra* note 12, at 198–99 (“Rule 8.4(g) is not a sop to political correctness. It responds to a real problem faced by members of the groups it aims to protect. The behavior it describes can cause harm.”). “The effects of experiencing sexual harassment can be profound, and can range from uncomfortable to devastating. They may last a short or long time, and can even generate a ‘ripple effect’ of negative symptoms in the affected workplace or living environment.” STANFORD UNIVERSITY, *supra* note 17.

142. See Pfenniger, *supra* note 7, at 173 (“[A]t an October 1990 meeting sponsored by the American Bar Association and the American Law Institute, the managing partners of more than half the represented law firms acknowledged investigating complaints of sexual harassment in their offices.”); see also Gillers, *supra* note 12, at 201 (summarizing the history of ABA efforts to set forth a rule to address the issue of sexual harassment in the legal profession beginning in 1994).

143. Gillers, *supra* note 12, at 201.

144. *Id.*

145. *Id.* at 202–05.

146. *Id.* at 205 (quoting ABA House of Delegates, Tr. of Proceedings, Feb. 2–3, 1998, at 81). “Perhaps because the proponents again expected to lose . . . the Ethics Committee chair, withdrew the comment and ‘requested input from Sections and Committees that have any questions about the resolution.’” *Id.* at 206 (quoting ABA House of Delegates, Tr. of Proceedings, Feb. 2–3, 1998, at 25).

Ultimately the comment was approved, but the language of the comment was too narrow to adequately deal with the issue of sexual harassment in all aspects of the legal profession.¹⁴⁷ Finally, in 2015, the American Bar Association Ethics Committee offered a draft of Rule 8.4(g) providing that it was “professional misconduct to ‘knowingly harass or discriminate against persons’ based on a list of eleven attributes.”¹⁴⁸ In August 2016, by a voice vote,¹⁴⁹ the amendments to Model Rule 8.4(g) passed.¹⁵⁰

In the Report to the House of Delegates, the Chair of the American Bar Association Ethics Committee stated, “It is important to acknowledge that the current provision was a necessary and significant step to address the issues of bias, prejudice, discrimination and harassment in the Model Rules.”¹⁵¹ In discussing why amending the Model Rules to include a black letter prohibition on harassment and discrimination the Chair of the Ethics Committee reasoned, “‘Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.’ Thus, the ABA did not squarely and forthrightly address . . . harassment as would have been the case if this conduct were addressed in the text of a Model Rule.”¹⁵² The Chair expressed that changing the previous prohibition from a comment to a rule “makes an important statement to our profession and the public that the profession does not tolerate prejudice, bias, discrimination and harassment. . . . It . . . clearly puts lawyers on notice that refraining from such conduct . . . is a *specific requirement*.”¹⁵³

147. See, e.g., *id.* at 207 (“For five reasons, [the comment] should be seen to achieve little or even nothing.”). The author proposes:

First, the comment only applies when the conduct prejudices the administration of justice Second, the comment only applies if the conduct occurs ‘in the course of representing a client,’ which means it would not apply to biased conduct elsewhere, such as within a law firm, at a bar organization, or if a lawyer were before a tribunal as a witness or a party Third, the biased conduct must be done ‘knowingly’ Fourth, the comment by itself has no force because a comment is not a rule. Fifth, and critically, the comment adds nothing to Rule 8.4(d).

Id. (footnotes omitted).

148. *Id.* at 211 (quoting MODEL RULES OF PROF'L CONDUCT R. 8.4 (AM. BAR ASS'N, Discussion Draft 2015), http://www.americanbar.org/contentdam/abaadministrative/professional-responsibility/draft_07082015.authcheckdam.pdf [<http://perma.cc/P66X-34EE>]).

149. *Id.* at 196–97.

150. See generally *Resolution 109*, *supra* note 12 (amending Rule 8.4 and Comment to include a prohibition on harassment and discrimination).

151. *Id.* at 2.

152. *Id.* at 4.

153. *Id.* (emphasis added).

As demonstrated, the amendment of Model Rule 8.4 was not unwarranted.¹⁵⁴ So, in light of the prevalence of sexual harassment,¹⁵⁵ the negative effects harassment has on its victims,¹⁵⁶ and of the special responsibility of attorneys,¹⁵⁷ Texas must adopt a rule of professional conduct declaring it misconduct for an attorney to engage in sexual harassment.

V. TEXAS HAS NO RULE EFFECTIVELY PROHIBITING SEXUAL HARASSMENT IN THE LEGAL PROFESSION

As it stands, the Texas Disciplinary Rules of Professional Conduct assigns no explicit obligation to attorneys practicing in Texas to refrain from sexual harassment while engaging in their role as lawyers.¹⁵⁸ Taking into account the negative physical¹⁵⁹ and psychological effects¹⁶⁰ of harassment along with the consequent special obligations of attorneys,¹⁶¹ it is clear that the addition of a black letter rule forbidding harassment in the legal profession is imperative. The time has come for Texas—and other states—to take a stand and make efforts to mitigate the pervasive issue of harassment in the legal profession. Below, this Comment proposes three alternatives for

154. See Zillman, *supra* note 15 (reporting that fifty-four percent of women have experienced sexual harassment); see also Rhode, *supra* note 6, at 19 (discussing the prevalence of sexual harassment in the legal profession).

155. Rhode, *supra* note 6, at 19 (“Almost three-quarters of female lawyers believe that harassment is a problem in their workplaces.”).

156. See STANFORD UNIVERSITY, *supra* note 17 (“The effects of experiencing sexual harassment can be profound and can range from uncomfortable to devastating.”); see also Spector, *supra* note 8 (reporting the most common issues affecting victims of sexual harassment).

157. See TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 1, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9) (requiring lawyers “to maintain the highest standards of ethical conduct”); TEX. GOV'T CODE ANN. § 82.037 (necessitating an oath “that the person will . . . conduct oneself with integrity and civility in dealing and communicating with the court and all parties”); TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM ¶ 1 (“A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.”).

158. See generally TEX. DISCIPLINARY RULES PROF'L CONDUCT (lacking any prohibition on harassment).

159. STANFORD UNIVERSITY, *supra* note 17.

160. Spector, *supra* note 8.

161. See TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 1 (describing a lawyer's special responsibility); TEX. GOV'T CODE ANN. § 82.037 (directing attorneys to take an oath to act with civility and integrity); TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM (mandating professionalism of attorneys).

consideration in framing an amendment to Rule 8.04 to include a prohibition on harassment in the legal profession.

A. *Why Texas Needs a Rule Akin to Model Rule 8.4(g)*

The pervasiveness of sexual harassment in the legal profession is shocking.¹⁶² Furthermore, the seriousness of sexual harassment should not be minimized, as its effects are long-lasting and severe.¹⁶³ As members of a self-regulating profession,¹⁶⁴ lawyers must take a stand and make a statement that behavior of this sort is unacceptable.¹⁶⁵ In consideration of the inherent difficulty victims face in seeking redress when they have been subject to sexual harassment together with the special responsibility of attorneys, Texas must amend Rule 8.04 to include some prohibition on sexual harassment. However, this is not to say that Texas requires such a rule in order to supplant criminal punishment or to subvert civil causes of action. Instead, this rule is necessary to protect both members of the profession who are being tormented, and the professional image attorneys have cultivated in society.¹⁶⁶

B. *Iowa Rule of Professional Conduct 32:8.4(g)*

The Iowa Rules of Professional Conduct state, “It is professional misconduct for a lawyer to . . . engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer’s discretion and control to do so.”¹⁶⁷ As previously demonstrated, the analysis used in an Iowa disciplinary proceeding against an attorney for sexually inappropriate conduct with a client was far more straightforward than the analysis that courts of other

162. See Rhode, *supra* note 6, at 19 (reporting findings from a survey indicating that between one half to two-thirds of female lawyers experienced or observed sexual harassment).

163. See Spector, *supra* note 8 (“Some research has found that sexual harassment early in one’s career in particular can [cause] long-term depressive symptoms.”).

164. See, e.g., TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 8.03 (requiring lawyers with knowledge of a violation of the rules of profession conduct to report such violation to the appropriate authority).

165. See TEX. DISCIPLINARY RULES PROF’L CONDUCT preamble ¶ 9 (“Each lawyer’s own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. . . . So long as its practitioners are guided by these principles, the law will continue to be a noble profession.”).

166. See TEXAS LAWYER’S CREED—A MANDATE FOR PROFESSIONALISM ¶ 1 (“A lawyer should always adhere to the highest principles of professionalism.”).

167. IOWA RULES OF PROF’L CONDUCT R. 32:8.4 (2018).

states have undertaken to punish similar behavior.¹⁶⁸ In its opinion, the court stated that the rule forbidding sexual harassment by attorneys “was adopted in response to a recommendation made by the Equality in the Courts Task Force.”¹⁶⁹ Further, the court stated: “The report reveals that the recommendation to amend the Code of Professional Responsibility by the adoption of DR 1–102(A)(7) [now 32:8.4] was made in the context of the task force’s study of courtroom and professional interactions.”¹⁷⁰ As the opinion makes clear, Iowa’s Equality in the Courts Task Force recognized harassment and bias as a significant issue in the legal profession and accordingly amended the rule of misconduct to address the issue of harassment by forbidding sexual harassment “in the practice of law.”¹⁷¹

Unlike the ABA Model Rule, Iowa Rule 32:8.4 does not have a knowledge requirement.¹⁷² Because of this, some states, including Texas, may—for good reason—give pause before selecting this option for consideration in amending its respective misconduct rule. However, the lack of a culpability requirement is not a fatal flaw for Iowa’s rule of misconduct. In fact, the lack of a knowledge requirement in this context is reasonable in light of the role lawyers play as advisors to clients.¹⁷³ Because attorneys are often called upon to draft and implement effective sexual harassment policies for clients, “Our ambivalence and at times, delinquency in this area is unacceptable, especially because we are well aware of the concrete steps as a profession we can take to eradicate sexual harassment.”¹⁷⁴ Thus, attorneys ought to

168. Compare Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Steffes, 588 N.W.2d 121, 125 (Iowa 1999) (“[W]e conclude the photographs were sexual in nature, taken to satisfy Steffes’s own prurient interests. We hold, therefore, that Steffes violated DR 1–102(A)(7) by engaging in sexual harassment of his client.”), with Otis’ Case, 609 A.2d 1199, 1202–03 (N.H. 1992) (analyzing the attorney’s actions under a concurrent conflict of interest and concluding he had violated the disciplinary rule forbidding an attorney from representing a client despite a concurrent conflict of interest).

169. *Steffes*, 588 N.W.2d at 124.

170. See also *id.* (“The report addresses not only sexual discrimination in the workplace, but also discriminatory treatment received by women in the courtroom and from the legal system in general.”).

171. *Id.*

172. Compare IOWA RULES OF PROF’L CONDUCT R. 32:8.4 (requiring culpability only with respect to responsibility for actions of others), with MODEL RULES OF PROF’L CONDUCT R. 8.4 (AM. BAR ASS’N 2018) (declaring action misconduct if “the lawyer knows or reasonably should know” that the action constitutes harassment or discrimination).

173. See Lazar, *supra* note 4 (discussing the role of lawyers in abrogating sexual harassment). “Lawyers take an oath when admitted to the bar to be the gatekeepers of the rule of law and to lead by example. We advise and counsel corporations, government agencies, not-for-profits, and in-house counsel to implement policies to curb sexual harassment.” *Id.*

174. *Id.*

know what conduct constitutes sexual harassment.¹⁷⁵ Even if there is some question about whether an act crosses a line, the lawyer's employer must have procedures in place for dealing with harassment and must provide education on the matter to all employees in the workplace,¹⁷⁶ which would put the harasser on notice that such conduct is unacceptable.

In sum, Iowa's misconduct rule provides a viable option for Texas's consideration because the rule provides a straightforward manner of dealing with harassment in the legal profession. Despite the lack of a culpability requirement, the rule is a practicable option because Texas law requires training and procedures for handling the matter of sexual harassment.¹⁷⁷

C. *Minnesota Rule of Professional Conduct 8.4(g)*

Minnesota's Rules of Professional Conduct state, "It is professional misconduct for a lawyer to . . . harass a person on the basis of sex . . . in connection with a lawyer's professional activities."¹⁷⁸ The comment to Minnesota Rule 8.4(g) notes:

Paragraph (g) specifies a particularly egregious type of discriminatory act—harassment on the basis of sex What constitutes harassment in this context may be determined with reference to antidiscrimination legislation and case law thereunder. This harassment ordinarily involves the active burdening of another, rather than mere passive failure to act properly.¹⁷⁹

Like the Iowa misconduct rule,¹⁸⁰ the Minnesota rule would allow for a straightforward analysis under which to scrutinize attorney misconduct.¹⁸¹ Similarly, the Minnesota rule does not have a culpability requirement¹⁸²—

175. *Id.*

176. *See* TEX. LAB. CODE ANN. § 21.010 (providing guidance on employment discrimination training for state employees).

177. *Id.*

178. MINN. RULES OF PROF'L CONDUCT R. 8.4 (2018).

179. *Id.* at cmt. 4.

180. IOWA RULES OF PROF'L CONDUCT R. 32:8.4 (2018).

181. *Cf.* Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Steffes, 588 N.W.2d 121, 124 (Iowa 1999) (declaring an attorney's action in taking nude photographs of his client as sexual harassment and punishing him accordingly). Like the Iowa rule, the Minnesota rule is broad in scope—encompassing activities "in the practice of law" and "in connection with a lawyer's professional activities." IOWA RULES OF PROF'L CONDUCT R. 32:8.4; MINN. RULES OF PROF'L CONDUCT R. 8.4(g).

182. MINN. RULES OF PROF'L CONDUCT R. 8.4.

unlike the Model Rule¹⁸³—but the lack of mens rea is not the rule's *Achilles' Heel* in light of the requirement that every public employer in Texas must provide discrimination training.¹⁸⁴

Everything considered, Minnesota's rule of misconduct provides a second practical option for Texas to consider in reframing its respective rule of misconduct to adequately address the issue of sexual harassment. Notwithstanding the rule's lack of a culpability requirement, the rule provides another suitable option for framing a rule of misconduct that sufficiently addresses the issue of sexual harassment in the legal profession.

D. *Maryland Rule of Professional Conduct 19–308.4*

In Maryland, “It is profession misconduct for an attorney to . . . knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon . . . sex . . . when such action is prejudicial to the administration of justice . . .”¹⁸⁵ Additionally, the commentary to Maryland Rule 19–308.4 states, “Sexual misconduct or sexual harassment involving colleagues, clients, or co-workers may violate section (d) or (e) of this Rule. This could occur, for example, where coercion or undue influence is used to obtain sexual favor in exploitation of these relationships.”¹⁸⁶ The commentary further clarifies the scope of Rule 19–308.4(e) stating, “Section (e) of this Rule reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal

183. MODEL RULES OF PROF'L CONDUCT R. 8.4 (AM. BAR ASS'N 2018).

184. TEX. LAB. CODE ANN. § 21.010 (West 2015) (instructing each state agency must provide employment discrimination training to all employees).

185. See MD. RULES OF PROF'L CONDUCT R. 19–308.4(e) (2018) (containing the functional equivalent of Rule 8.4). The commentary to Maryland's rule adds sexual harassment, but Texas does have a very similar black-letter rule. This language is very similar to the new Texas Disciplinary Rules of Conduct Rule 5.08(a) that states:

Prohibited Discriminatory Activities: (a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.

State Bar of Texas, *Texas Disciplinary Rules of Professional Conduct* R. 5.08(a) 86 (2018) <https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=27271&Template=/CM/ContentDisplay.cfm> [https://perma.cc/8NPW-SPR8]. As of the date of this publication, this rule has not been cataloged with either West or Lexis.

186. MD. RULES OF PROF'L CONDUCT R. 19–308.4 cmt. 3.

system. . . . Such conduct manifests a lack of character required of members of the legal profession.”¹⁸⁷

Like Iowa and Minnesota, Maryland recognizes how significant the issue of sexual harassment really is in the legal profession. A Maryland court noted:

The courts and the bar must be aware of our obligation to keep the legal profession free of sexual harassment. Since attorneys are its officers, th[e] Court has the duty “to insist upon the maintenance of the integrity of the bar and to prevent the transgressions of an individual lawyer from bringing its image into disrepute.”¹⁸⁸

Unlike Iowa and Minnesota’s respective misconduct rule, Maryland attaches a culpability requirement¹⁸⁹ that some states may find more appealing so as to prevent what some might consider absolute or strict liability.¹⁹⁰

Because of Maryland’s culpability requirement, many states might be more at ease using the rule in shaping its own rule of misconduct. Maryland’s rule provides a safe middle-ground for Texas to utilize in reframing its own rule of misconduct. However, the rule itself does not outright prohibit sexual harassment. It is only in the commentary where the phrase “sexual harassment” is used and explained to constitute a violation of the rule of misconduct.¹⁹¹ This does not have the effect of making sexual harassment an outright violation of the rules of professional conduct,¹⁹² and does not make the statement that sexual harassment is unacceptable, like the Iowa and Minnesota Rules of Professional Conduct do.

187. *Id.* at cmt. 4. “As a result, even when not otherwise unlawful, an attorney who, while acting in a professional capacity, engages in the conduct described in section (c) of this Rule and by doing so prejudices the administration of justice commits a particularly egregious type of discrimination.” *Id.*

188. Attorney Grievance Comm’n of Md v. Goldsborough, 624 A.2d 503, 513 (Md. 1993) (quoting Md. State Bar Ass’n v. Agnew, 318 A.2d 811, 814 (Md. 1974)).

189. MD. RULES OF PROF’L CONDUCT R. 19–308.4(e) (requiring the attorney *knowingly* manifest bias or prejudice on the basis of sex to constitute professional misconduct).

190. Gillers, *supra* note 12, at 217. “Adding ‘should have known’ to the rule has the salutary effect of encouraging lawyers to learn what conduct is deemed harassing because ignorance will not be a defense.” *Id.* at 219.

191. MD. RULES OF PROF’L CONDUCT R. 19–308.4 cmt. 3.

192. *See, e.g.*, TEX. DISCIPLINARY RULES PROF’L CONDUCT preamble ¶ 10, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9) (“The Comments do not, however, add obligations to the rules and no disciplinary action may be taken for failure to conform to the Comments.”).

Ultimately, Maryland's Rule 19–308.4 is a somewhat weaker, but still a viable option for combatting sexual harassment in the legal profession. Ideally, Texas will take a stance and make a statement that sexual harassment in the legal profession is intolerable. Therefore, a rule which expressly includes an outright ban on sexual harassment is preferable. However, Maryland's rule and its comments still stand as a means through which to sanction such harassment in the legal profession.

VI. CONCLUSION

As mentioned, sexual harassment can have crippling effects on its victims.¹⁹³ Additionally, the prevalence of sexual harassment in America—and particularly within the legal profession—is alarming.¹⁹⁴ Texas is failing to address the problem of sexual harassment in the legal profession by not adopting a rule analogous to Model Rule 8.4 or any of the three proposed options. While each of the three suggested rules has its own strengths and weaknesses, each rule will adequately handle intolerable sexual harassment

A. *Final Remarks: Iowa Rule 32:8.4(g)*

In both practice and theory, Iowa's Rule 32:8.4(g) appropriately addresses the sort of behavior this Comment seeks to condemn.¹⁹⁵ Despite the absence of a culpability requirement, the rule still sufficiently and fairly sanctions conduct that is offensive. Additionally, the scope of the rule is not overbroad.¹⁹⁶ In conclusion, Texas should consider Iowa Rule 32:8.4(g) in amending Texas Rule 8.04 to effectively sanction sexual harassment in the legal profession.

193. See Spector, *supra* note 8 (“Dr. Colleen Cullen, a licensed clinical psychologist, notes that for victims of sexual harassment, the most common diagnoses are depression, anxiety, and even post-traumatic stress disorder (PTSD).”).

194. See Rhode, *supra* note 6, at 19 (revealing between fifty to sixty-six percent of women reported being the victim of or observing sexual harassment); Zillman, *supra* note 15 (“[M]ore than half of all American women—54%—have experienced ‘unwanted and inappropriate sexual advances’ at some point in their lives.”).

195. See Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Steffes, 588 N.W.2d 121, 124 (Iowa 1999) (punishing an attorney for taking nude photographs of his client under a pretext).

196. See IOWA RULES OF PROF'L CONDUCT R. 32:8.4(g) (2018) (“It is professional misconduct for a lawyer to . . . engage in sexual harassment . . . in the practice of law . . .”). Conduct that constitutes sexual harassment outside the context of the practice of law—for example, while away on an unrelated vacation—is unreachable by this rule. Cf. Gillers, *supra* note 12, at 207 (“[T]he comment only applies if the conduct occurs ‘in the course of representing a client,’ which means it would not apply to biased conduct elsewhere . . .”).

B. *Final Remarks: Minnesota Rule 8.4(g)*

Like the Iowa rule, Minnesota Rule 8.4(g) is practical and fair despite the lack of a culpability requirement.¹⁹⁷ Similar to the Iowa rule, the Minnesota misconduct rule actively limits the scope of its purview to harassment occurring “in connection with a lawyer’s professional activities.”¹⁹⁸ Overall, Minnesota Rule 8.4(g) is a happy medium between the broader Iowa rule and the more limited Maryland rule.¹⁹⁹

C. *Final Remarks: Maryland Rule 19–308.4*

Maryland Rule 19–308.4 lacks an absolute prohibition on sexual harassment in the black-letter rule.²⁰⁰ However, where Maryland’s misconduct rule lacks an outright ban, it makes up in its culpability requirement.²⁰¹ Additionally, the scope of the Maryland misconduct rule is limited to such conduct occurring “when acting in a professional capacity.”²⁰² In sum, Maryland Rule 19–308.4 provides a practical framework from which Texas could craft a rule of misconduct to address the issue of sexual harassment.

In sum, Texas and every other state which has not adopted a rule akin to Model Rule 8.4(g) must adopt a rule—in some form—to appropriately address the epidemic of sexual harassment in the legal profession. Preferably, such a rule will include a prohibition on sexual harassment in the black letter rule rather than only in the commentary to make the statement that the legal profession will not stand for harassment or discrimination. As members of a learned profession, disciples of justice, and individuals bearing

197. See MINN. RULES OF PROF’L CONDUCT R. 8.4(g) (2018) (omitting any requirement of culpability). But see TEX. LAB. CODE ANN. § 21.010 (West 2015) (requiring state agencies to provide discrimination training to all employees including education on the matter of sexual harassment).

198. MINN. RULES OF PROF’L CONDUCT R. 8.4(g). The scope of this rule is narrower than that of Iowa’s rule. Compare IOWA RULES OF PROF’L CONDUCT R. 32:8.4(g) (forbidding harassment “in the practice of law”), with MINN. RULES OF PROF’L CONDUCT R. 8.4(g) (prohibiting harassment “[i]n connection with a lawyer’s professional activities”).

199. See IOWA RULES OF PROF’L CONDUCT R. 32:8.4(g) (prohibiting sexual harassment “in the practice of law or knowingly permit[ting] staff or agents subject to the lawyer’s direction and control to do so.”); MD. RULES OF PROF’L CONDUCT R. 19–308.4(e) (2018) (banning bias or prejudice while “acting in a professional capacity”); MINN. RULES OF PROF’L CONDUCT R. 8.4(g) (condemning harassment “in connection with a lawyer’s professional activities”).

200. MD. RULES OF PROF’L CONDUCT R. 19–308.4(e).

201. *Id.*

202. *Id.*

a special responsibility, lawyers must lead by example and hold themselves and others accountable for sexual harassment.